In the High Court of Judicature at Madras

Dated:24.01.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.293 OF 1997

C.Jagadeesan ..Appellant/Plaintiff.

V

C.Kishtan ..Respondent/Defendant.

Second appeal filed under Section 100 of CPC against the judgment and decree dated 24.9.1996 made in A.S.No.103 of 1993 on the file of Sub Court, Arni confirming the Judgment and decree dated 14.8.1991 made in O.S.No.685 of 1986 on the file of Principal District Munsif's Court, Arni.

For Appellant : Mr.T.Dhanyakumar
For Respondent : Mr.S.Mohanasundararajan
for Mr.A.Jenasenan.

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.103 of 1993 on the file of Sub Court, Arni by the plaintiff, who has lost his case before the Courts below.

2. The short facts of the plaintiff's case in the plaint are that the suit is filed for declaration of his title, for recovery of possession of the suit property from the defendant and also for mesne profits. The plaint schedule property originally was lying as a vacant site. The plaint schedule property was purchased by the father of the plaintiff and the defendant viz., Chinnasamy Udayar on 1.9.1952 from one Murugesa Chettiar. After the purchase of the plaint schedule property, the said Chinnasamy Udayar had constructed a terraced house and was in possession and enjoyment of the same. Apart from the said house in the suit property, Chinnasamy Udayar also had three houses and he permitted each of his sons to live in the said house separately. The defendant is residing in the plaint schedule property only with the permission of his father, Chinnasamy Udayar. The said Chinnasamy Udayar, the father of the plaintiff and the defendant had executed a settlement deed in respect of the plaint schedule property on 18.1.1982. The plaintiff has accepted the said settlement. After the said deed of settlement , the plaintiff approached his brother defendant to vacate from the plaint schedule house

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and to hand over the possession of the same. But without any acceptable reasoning, the defendant continuous to stay in the plaint schedule property. The plaintiff has issued a suit notice on 18.7.1986 for which the defendant has issued a reply notice containing false allegations. The plaint schedule property is a self-acquired property of the plaintiff and defendant's father Chinnasamy Udayar. There was no partition entered into between the parties. Hence the suit.

3. The defendant in his written statement would contend that the plaint schedule property was originally lying as a vacant land and subsequently the father of the plaintiff and the defendant Chinnasamy Udayar had constructed a house in it. The plaint schedule propeprty was not purchased out of the income of Chinnasamy Udayar. On the other hand, from out of income derived from the joint family property only , the plaint schedule property was purchased by the father of the plaintiff and defendant viz., Chinnaswamy Udayar. Originally, the suit property is a joint family property. During 1965, the ancestral properties of Chinnasamy Udayar along with other properties were orally partitioned between his sons Velayutham, Krishnan, Subramanian, and Jagadeesan. From that date onwards, the sons are in possession and enjoyment of their respective shares independently. The defendant has constructed a house in the property allotted to him in the oral partition towards his share. The defendant is in the suit property from 1965 onwards. The alleged settlement is not valid. Hence the suit is liable to be dismissed.

4. On the above pleadings, the trial Court had framed two issues and four additional issues for trial. On the side of the plaintiff, P.W1 and P.W.2 were examined and Exs P1 to P5 were marked. On the side of the defendant D.W.1 to D.W.5 were examined and Exs B1 to B13 were marked.

5. After going through the oral and documentary evidence, the learned trial Judge has held that the plaintiff is not entitled to any relief and consequently dismissed the suit without costs. Aggrieved by the Judgement of the learned trial Judge, the plaintiff has preferred A.S.No.103 of 1993 before the first appellate Court which has dismissed confirming the trial Court's Judgement. Hence the second appeal.

6. The substantial question of law involved in this appeal is
" Whether the Courts below are right in upholding the oral partition pleaded by the defendant?

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7. I heard Mr.T.Dhanyakumar, learned counsel appearing for the appellant and Mr.Mohanasundararajan, learned counsel appearing for the respondent and considered their respective submissions.

8.The Point:
Admittedly the plaintiff and the defendant are the blood brothers. The father of the plaintiff and defendant Chinnasamy Udayar was examined as

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P.W.2. The plaintiff claims right and title in respect of the plaint schedule property under a settlement deed Ex A2 dated 18.1.1982 said to have been executed by his father Chinnasamy Udayar. According to the plaintiff, the suit property is a self acquired property of the father of the plaintiff and the defendant viz., Chinnasamy Udayar under Ex A1 deed dated 1.9.1952. Against the case of the plaintiff, it is the case of the defendant that as per Ex A2 settlement deed no possession was conveyed to the plaintiff by the father Chinnasamy Udayar and in the year 1965 itself, there was an oral partition entered into between the brothers and as per the oral partition, the brothers are in possession and enjoyment of their respective shares in the suit property. This fact has been discussed by the learned First appellate Court in paragraphs 8 and 9 of its Judgment.

> What is a gift has been defined under Section 122 of the Transfer of Property Act. "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee" Acceptance when to be made:- Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

The settlement deed Ex A2 in favour of the plaintiff is dated 18.1.1982. As per Section 123 of the Transfer of Property Act,the gift is to be effected,ie., the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered. It is seen from the evidence that after executing Ex A2 in favour of the plaintiff, no delivery was effected in respect of the suit property till 1986, the year of filing of the suit. There is no explanation from the plaintiff why he kept quiet for nearly four years from the date of execution of Ex A2 without taking delivery of possession of the suit property.

9. On the other hand, it is seen from the appellate Court's Judgment that defendant and brothers are in possession of their respective shares of0 the suit property, after the oral partition entered into between them in the year 1965. Ex B8 and Ex B9 are all pattas in respect of the defendant's properties and EX B10 is the sale deed executed by the defendant in favour of one Selvi in the year 1989.
Ex B11 is also another sale deed executed by the defendant in favour of Muthu Banshasari Ammal and Ex B12 is the receipt for having paid electricity consumption charges. Both the Courts below have on the basis of the above said documents in favour of the defendant have come to a concurrent finding that there was partition among the brothers and as per

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the oral partition, the parties are in possession and enjoyment of their respective shares in the family properties including the suit property from 1965 onwards. There is no explanation let in by the plaintiff to show that the settlement deed under Ex A2 has been given effect to till the filing of the suit. Under such circumstances, I hold that there is no merits in the appeal to warrant interference in the Judgment of the first appellate Court in A.S.No.103 of 1993 on the file of Sub Court, Arni. The point is answered accordingly.

10. In the result, the appeal is dismissed confirming the decree and Judgment in A.S.No.103 of 1993 on the file of the Sub Court, Arni Considering the close relationship of the parties, there is no order as costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To

1. The Subordinate Judge, Arni

2. The Principal District Munsif, Arni

3. The Section Officer, VR Section,
High Court, Madras.

+ 1 CC To Mr. T.Dhanyakumar, Advocate SR NO.4671

+ 1 CC To Mr. A.Jenasenan, Advocate SR NO.5057

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